UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE
SUBREGION THIRTY-THREE

CHAMPAIGN BUILDERS SUPPLY COMPANY

and Case 25-CA-114095

TEAMSTERS LOCAL UNION NO. 26

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Comes now Counsel for the General Counsel and respectfully submits this Answering Brief to Respondent Champaign Builders Supply Company's Exceptions to the Administrative Law Judge's Decision. This Answering Brief specifically addresses each of Respondent's Exceptions numbered One and Two. Counsel for the General Counsel hereby requests that said exceptions be denied and that the Administrative Law Judge's Decision be affirmed. In support of this position, Counsel for the General Counsel offers the following:

I. Statement of the Case

On January 31, 2014, based upon charges filed by Teamsters Local Union No. 26 (the "Union"), the Regional Director for Region 25, Subregion 33 issued a Complaint. The Complaint alleges that Champaign Builders Supply Company ("Respondent") engaged in conduct violative of Section 8(a)(1) and 8(a)(5) of the Act by unlawfully failing and refusing to bargain with the Union about the effects of Respondent's decision to close down its business. A hearing was held on March 24, 2014 on the issues raised by the Complaint before Administrative

Law Judge Melissa M. Olivero. On August 7, 2014 the Administrative Law Judge issued her Decision in which she recommended that Respondent cease and desist from failing to timely notify the Union of its decision to close its facility in September 2013 and afford the Union an opportunity to bargain over the effects of this decision; bargain with the Union with respect to the effects of Respondent's decision to close its facility; and pay its former employees in the bargaining unit their normal wages when in Respondent's employ from 5 days after the date of the Board's decision and order until the occurrence of the earliest of the following conditions: (1) Respondent bargains to agreement with the Union about the effects of the decision to close its business; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 days after the receipt of this decision and order, or to commence negotiations within 5 days after receipt of Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. On September 4, 2014, Respondent filed two exceptions to the Administrative Law Judge's decision. Counsel for the General Counsel now responds to Respondent's exceptions.

II. Respondent has Waived its Right to File Exceptions to the Administrative Law Judge's Conclusions of Law, Remedy, Recommended Order, and Notice

Under Section 102.46(b)(1) of the Board's Rules and Regulations and Statements of Procedures, each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which the exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. Section 102.46(b)(2) provides that any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Respondent specifically objected to the Administrative Law Judge's finding on "Page 5, Lines

37-39 specifically 'Although she [Ms. Elliott] listened to Marxmiller's suggestions, no evidence indicates she altered her plans regarding the shutdown in anyway,'" and Judge Olivero's characterization found on "Page 7, Lines 5 through 13, that they are seeking to be excused or justified in their bargaining attempts." These are the only two specific exceptions Respondent raises regarding the Administrative Law Judge's decision.

Respondent did not take exception to the Administrative Law Judge's Conclusions of Law, Remedy, Recommended Order, and Notice found on pages 7-10 and Appendix of the decision. Pursuant to Section 102.46(b)(2) of the Board's Rules and Regulations, Respondent has waived their right to take exception to the Administrative Law Judge's Conclusions of Law, Remedy, Recommended Order, and Notice. Therefore, Counsel for the General Counsel requests that the Board affirm the Administrative Law Judge's decision, including the Conclusions of Law, Remedy, Recommended Order, and Notice.

III. The Administrative Law Judge Correctly Found that No Evidence Presented at the Hearing Indicated that Respondent's Agent, Marsha Elliott, Altered her Plans Regarding the Closing of Respondent's Facility

In Exception Number One, Respondent excepts to the finding of the Administrative Law Judge on Page 5, Lines 37-39, specifically "Although she [Ms. Elliot] listened to Marxmiller's suggestions, no evidence indicates she altered her plans regarding the shutdown in anyway." It is the Counsel for the General Counsel's position that the Administrative Law Judge correctly found, and the record reflects, that the August 21, 2013 conversation between Union Business Agent David Marxmiller and Marsha Elliott did not amount to meaningful effects bargaining under the Act. Specifically, the record clearly supports the finding that this conversation did not cause Director Elliott to alter her plans regarding the closing of Respondent's facility.

When Marxmiller was finally able to speak with Director Elliott regarding his request to bargain over the effects of Respondent's decision to close this facility, Director Elliott responded by saying there was nothing in the contract stating she had to bargain the effects (TR 43). Marxmiller reminded Elliott that the Union and Respondent had an agreement until September 9, 2014 and that there were benefits owed under that contract (TR 44). Elliott stated that she had already paid a bonus that was not due under the contract to the employees until September 2013. Director Elliott also mentioned that she was starting to pay employees for their accrued vacation time (TR 44, 56). Both of these statements by Director Elliott indicated that she had decided how to handle the closing of this facility and had begun implementing her plan. Marxmiller asked Elliott whether the Respondent had considered extending the healthcare coverage for the employees, if the Respondent would also pay the bonuses due in 2014 under the contract, and if there was a possibility for a severance package (TR 44). Elliott did not give any assurances about these subjects, but mentioned that she would look into possibly paying the bonuses due in 2014 (TR 44-45). However, despite this promise of looking into this possibility, Director Elliott never contacted Marxmiller to further bargain about these offers and no evidence was presented at the hearing to show that the shutdown "plan" was altered after this conversation.

Respondent argues that it did not have any obligation to alter the plans to shut down operations, but only to bargain over the effects of that shut down. The Administrative Law Judge's finding that Respondent never "altered her plans regarding the shutdown in anyway" does not assign fault to Respondent for failing to bargain over the decision to close this facility. Rather, this statement accurately describes the state of negotiations regarding any bargaining between the parties over the *effects* of this decision to close the facility. Director Elliott unilaterally decided to provide a bonus to employees and pay them for their accrued vacation

time. This decision was not made in response to any bargaining with the Union. The Union had other proposals to discuss with Respondent, yet these proposals were never fully bargained over or implemented (TR 44-46). Based upon the record, the Administrative Law Judge's finding that Director Elliott did not alter her plans regarding the shutdown in any way should be sustained.

IV. The Administrative Law Judge Properly Characterized Respondent as Seeking to be Excused or Justified in their Bargaining Attempts

In Exception Number Two, Respondent excepts to the "characterization of the Administrative Law Judge found on Page 7, Lines 5 through 13, that they are seeking to be excused or justified in their bargaining attempts." Without considering whether the Administrative Law Judge's characterization of Respondent's argument is correct, it should be noted that Respondent clearly raises this very same argument in its Exceptions Brief to the Board. Thus, on page 2 of its Exceptions Brief, Respondent argues that the financial conditions of Respondent "severely limited" Respondent's ability to bargain with the Union about compensation for the bargaining unit employees. Respondent argues that the Union's demands were impracticable and based on the Respondent's financial constraints, further conversations regarding the effects of Respondent's decision to close its facility would have been futile (Respondent's Exceptions Brief, page 3). Essentially, Respondent in its Exceptions Brief has argued that it was excused and justified in its bargaining attempts based on the financial conditions of Respondent. This is the very same argument Respondent presented to the Administrative Law Judge, and it is the same argument which was correctly rejected based on the evidence in the record.

To the extent Respondent is asserting that the Administrative Law Judge was incorrect in concluding that Respondent's actions as detailed in the record were not justified or excused, and

therefore concluding that Respondent failed to bargain in good faith, there is also no basis to support this exception.

It is clearly settled that an employer has an obligation to bargain about the effects on unit employees of the employer's managerial decision to close its business, even if the employer has no obligation to bargain about the decision itself. *First National Maintenance*, 452 U.S. 666, 681-682 (1981), *Kiro, Inc.*, 317 NLRB 1325, 1327 (1995), *Good Samaritan Hospital*, 335 NLRB 901, 902 (2001). "There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by Section 8(a)(5)." *First National Maintenance*, 452 U.S. at 681 (1981). Section 8(a)(5) of the Act has been interpreted to require bargaining at a "meaningful time and in a meaningful manner" over the effects of a decision to close a facility. *Komatsu America Corp.*, 342 NLRB 649, 649 (2004). The duty to bargain may be violated "if a party has refused even to negotiate in fact." *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

The record clearly demonstrates that Respondent and the Union only had one conversation, approximately thirty-minutes long, regarding the effects of Respondent's decision to close its facility (TR 45). After this conversation, Respondent essentially ceased all communications with the Union, failing to return phone calls or respond to written letters (TR 45-47, 53). Instead of receiving any "significant opportunity to bargain," the record establishes that Respondent failed to provide the Union with any meaningful opportunity to bargain over the effects of its decision to close its business and lay off the entirety of the bargaining unit. As correctly found by the Administrative Law Judge, there were no counter proposals made to the Union's suggestions and no explanations were given for Respondent's contemplated actions (TR 45). Respondent presented the Union with nothing more than a fait accompli. Rather than

engaging in a good faith exchange of ideas, Respondent merely stated its intentions and failed to respond to the Union's requests for effects bargaining. As such, the Administrative Law Judge correctly found that Respondent failed to bargain with the Union in good faith over the effects of Respondent's decision to close its facility.

Additionally, in its Exceptions to the Administrative Law Judge, Respondent appears to raise the argument that Respondent and the Union reached an impasse during the brief conversation between Director Elliott and Union Representative Marxmiller on August 21, 2013. Respondent did not raise this argument in its post-hearing brief to the Administrative Law Judge and as such it is not properly before the Board. *See Auto Workers Local 594 v. NLRB*, 776 F.2d 1310, 1314 (6th Cir. 1985) ("Since the Union failed to raise this issue in a timely fashion before the ALJ, we hold that it waived this defense."), enfg. 272 NLRB 705 (1984); *Operating Engineers Local 520 (Mautz & Oren)*, 298 NLRB 768 fn. 3 (1990); *Yorkaire, Inc.*, 297 NLRB 401 (1989) ("A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived."), enfd. 922 F.2d 832 (3d Cir. 1990). Even assuming *arguendo* that Respondent's claim of impasse is properly before the Board, no impasse was reached in the instant case. During their August 21, 2013 conversation, Director Elliott merely explained the decisions she had already made regarding the effects of Respondent's decision to close its business, and stated that she would consider Marxmiller's proposals regarding health insurance, severance package, and any other bonuses owed under the collective-bargaining agreement (TR 44-45). Nothing in the record or in Respondent's argument supports any contention that the August 21, 2013 conversation, or any other correspondence between Respondent and the Union, constituted bargaining at a "meaningful time in a meaningful manner," nor is there any evidence supporting the contention that Respondent and the Union "hit

an impasse" allowing Respondent to implement its own plan regarding the effects of its decision to close this facility.

Respondent further contends that it would have been "impracticable" to continue to engage in discussions with the Union based on Respondent's limited financials. However, nothing in the record provides any evidence of Respondent's "limited financials" nor was evidence of "limited financials" presented to the Union despite the Union's multiple attempts to engage in effects bargaining with Respondent. Respondent attempts to equivocate lacking the resources to operate a facility with lacking the resources to bargain over the effects of closing its facility. Respondent does not offer any citation to the record to demonstrate that the Union was ever informed that Respondent was unable to compensate employees for closing its business. Respondent has not cited any Board decision finding that financial necessity can negate a requirement to bargain in good faith over the effects of closing a facility. Contrary to Respondent's position, the Board has repeatedly limited an employer's ability to use economic considerations as excuse for failing to bargain with a union. *Hawkins Lumber Co.*, 316 NLRB 837, 838 (1995). Absent unforeseen and extraordinary events requiring an employer to take immediate action and constituting a "dire financial emergency, the Board has held that economic events such as the loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortage do not justify unilateral action." *RBE Electronics of S.D.*, 320 NLRB 80. 81 (1995). The Administrative Law Judge considered Respondent's notion that economic necessity excused or justified Respondent's failure to bargain over the effects of its decision to close its facility. After reviewing the record, the Administrative Law Judge found no support for this argument in either the record or Board law. Therefore, the Administrative Law Judge's conclusion that Respondent is not excused or justified in its actions should be sustained.

V. Conclusion

For the foregoing reasons and based on the record as a whole, Counsel for the General Counsel respectfully requests that Respondent's Exceptions One and Two be denied in their entirety and the Administrative Law Judge's decision be upheld in its entirety.

Dated at Peoria, Illinois this 18th day of September 2014.

Respectfully submitted,

/s/ Katherine Miller

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CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of BRIEF TO THE ADMINISTRATIVE LAW JUDGE ON BEHALF OF THE GENERAL COUNSEL was served electronically on the following parties on September 18, 2014

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And was also e-filed on September 18, 2014 with:

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